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THE COMPTROLLER GENERAL
OF THE UNITED STATES

FILE: B-207380

DATE: June 30, 1982

MATTER OF: Automated Business Systems and Services, Inc.

DIGEST:

1. Bid which included restriction on its disclosure is properly rejected as nonresponsive since by statute bid must be publicly disclosed.
2. Where protester permits approximately two months to elapse between award of contract and filing of protest with GAO concerning competitor's failure to bid unit prices on two items required by solicitation, notwithstanding that contract presumably was being performed, protester did not diligently pursue protest and filing with GAO is consequently untimely and not for consideration.
3. Protest concerning funding provisions of solicitation is untimely since it concerns alleged impropriety in solicitation which is required to be filed prior to bid opening.

Automated Business Systems and Services, Inc. protests the decision of the Department of the Air Force, Randolph Air Force Base, Texas to reject its bid as nonresponsive and to award a contract under invitation for bids (IFB) No. F41689-81-B-0069 to a bidder whose price is higher than Automated's. We summarily deny the protest.

The IFB was issued to procure eleven "intelligent toggle systems" for use in a feasibility study by the Air Force's personnel center. Automated submitted the lowest price but attached to its bid a "non-disclosure clause" which, Automated asserted, it customarily uses when submitting offers in negotiated procurements. The clause provided as follows:

'This data, furnished in connection with Request for Proposal #41689-81-B-0069 shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed in whole or in part for any purpose other than to evaluate the proposal; provided, that if a contract is awarded to this offeror as a result of or in connection with the submission of this data, the Government shall have the right to duplicate, use or disclose the data to the extent provided in the contract. This restriction does not limit the Government's right to use information contained in the data if it is obtained from another source without restriction.'

With its protest, Automated enclosed correspondence it had exchanged with the Air Force prior to protesting to our Office. It shows that after bid opening, Automated attempted to convince the contracting officer that the non-disclosure clause was inadvertently attached to its bid and was, in any event, by its use of negotiation terms, applicable only to negotiated procurements. The contracting officer, however, determined that Automated's bid was nonresponsive and "reverified" that determination after considering Automated's arguments. In so doing, the contracting officer noted that vendors in the automated data processing community interchangeably use the terms "proposal" and "bid" when submitting offers and was guided by our decision in Prime Computer, Inc., B-204848, January 7, 1982, 82-1 CPD 20. In Prime Computer,

we upheld the rejection as nonresponsive of a bid in which the bidder had inserted a restrictive legend, even though the contracting officer had disclosed the bidder's price at the bid opening.

In its protest to our Office, Automated argues that the contracting officer erred in his reasoning because "professional procurement personnel of the Federal Government" do not interchangeably use negotiation terms and terms applicable to formal advertising. Automated maintains that the clause, by its use of negotiation terms, therefore has no "relevance" to the subject IFB, should be disregarded, and accordingly its bid is responsive. The protester also suggests that this deficiency may be corrected under the mistake-in-bid procedures.

The protest has no merit. By statute, bids are to be opened publicly. 10 U.S.C. § 2305(c) (1976). We have interpreted that requirement to mean that the bid must publicly disclose the essential nature and type of products offered and those elements of the bid which relate to price, quantity and delivery terms. Computer Network Corporation, 55 Comp. Gen. 445 (1975), 75-2 CPD 297. The purpose of public opening of bids is to protect both the public interest and bidders against any form of fraud, favoritism or partiality and such openings should be conducted to leave no room for any suspicion of irregularity. Page Airways, Inc., et al., 54 Comp. Gen. 120 (1974), 74-2 CPD 99. We therefore view restriction upon the disclosure of the bid as rendering the bid nonresponsive. See Computer Network Corporation, supra.

The facts of this case do not warrant a different result. First, we agree with the contracting officer that bidders often intermix terms properly associated with negotiation and terms properly related to formal advertising. Second, we cannot overlook the fact that the clause used here specifically made the present

solicitation, by number, subject to its terms. Third, the clause can be read as manifesting an intent to restrict the disclosure of Automated's bid as in a negotiated procurement where offers are not publicly opened and prices are not disclosed. See IFB, Inc., B-203391.4, April 1, 1982, 22-1 CPD 292, in which we upheld the rejection of a bid containing a non-disclosure clause virtually identical to that used by Automated.

As to the mistake-in-bid contention, Automated contends that this case does not fall within the general rule that a nonresponsive bid may not be corrected pursuant to the mistake-in-bid procedures. This is so, Automated states, because its use of negotiation terms in its nondisclosure clause made it clear that the clause was "not relevant" to this formally advertised procurement and therefore "there was no non-responsiveness to be corrected." Since we have concluded that the inclusion of the clause did render the bid non-responsive, the mistake-in-bid procedures are not available to remedy this deficiency in Automated's bid.

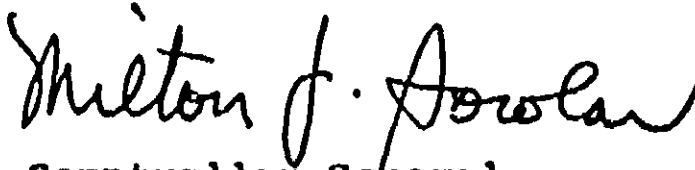
Finally, in a subsequent submission to our Office, Automated argues that the awardee failed to include unit prices in its bid for a Lease with Option to Purchase Plan and a Lease to Ownership Plan contrary to the terms of the solicitation. We note that by letter of March 30, 1982, Automated was informed by the contracting officer of the award of the contract. Yet, notwithstanding that a contract had been awarded, and presumably was being performed, Automated allowed approximately two months to elapse before protesting this issue to our Office. Our Bid Protest Procedures require that a protest be filed with our Office within 10 days after the basis for protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(b)(2) (1982). It is incumbent upon a potential protester to diligently seek whatever relevant additional information is needed to determine whether a basis for protest exists. National Council of Senior Citizens, Inc., B-196723, February 1, 1980,

80-1 CPD 87. A potential protester cannot sit idly by and wait for information that it could have obtained much earlier and then expect our Office to consider timely a protest based on that information. See Policy Research Incorporated, B-200386, March 5, 1981, 81-1 CPD 172. Accordingly, we do not believe that it can be said that Automated diligently pursued its protest of this matter and we must therefore consider this issue as untimely filed and not for our consideration. Graphics, Communication System, Inc., B-186715, July 23, 1976, 76-2 CPD 75.

Automated also suggests that the solicitation was defective insofar as it stated that "the [availability] of the appropriate type of funding, would be considered in making award. We also must regard this issue as untimely since any protest based on an alleged impropriety in the solicitation which is apparent prior to bid opening must be filed (received) in our Office prior to bid opening. 4 C.F.R. § 21.2(b)(1). Since Automated did not raise this matter until after bid opening, it is untimely and, therefore, will also not be considered on the merits.

Although acknowledging the untimeliness of these arguments, Automated suggests that these issues are "significant" within the meaning of 4 C.F.R. § 21.2(c). We have described a significant issue as one which involves a procurement principle of widespread interest, 52 Comp. Gen. 20 (1972), or which affects a broad class of procurements, Singer Company, 56 Comp. Gen. 172 (1976), 76-2 CPD 481. The exception is applied sparingly, Field Maintenance Services Corporation, B-185339, May 28, 1976, 76-1 CPD 350. We do not think that the issues in this case warrant invoking this exception to our timeliness standards.

Accordingly, the protest is summarily denied in part and dismissed in part.

for 
Comptroller General
of the United States